Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1869

ALFRED F. CHITTENDEN,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Your petitioner, Alfred F. Chittenden, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on April 15, 1976, which affirmed a judgment of the United States District Court for the Eastern District of Louisiana entered after a jury trial in which petitioner was convicted on eight counts of a seventy-count indictment.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(1).

The opinion of the Court of Appeals for the Fifth Circuit was filed April 15, 1976. A timely petition for rehearing and petition for rehearing *en banc* was filed and subsequently denied on May 26, 1976.

OPINIONS BELOW

The opinion of the district court is not reported. A copy of the opinion on the motion to arrest judgment and the motion for a judgment of acquittal or alternatively a new trial, which raised the issue of the applicability of 29 U.S.C. §§436 and 439(a) to petitioner, is reproduced herein as Appendix A. No written opinion was made by the district court on the remaining issues of this petition.

The opinion of the Court of Appeals for the Fifth Circuit is reported at ___ F.2d ___ and is also reproduced herein as Appendix B. The judgment issued pursuant to that opinion is reproduced herein as Appendix C. And the Order denying the petition for rehearing and petition for rehearing *en banc* is reproduced herein as Appendix D.

QUESTIONS PRESENTED

1. Whether the petitioner is a "person required to file" a financial report, within the meaning of 29 U.S.C.

§436, when 29 U.S.C. §431 declares that "[e]very labor organization shall file annually with the Secretary a financial report signed by its president and treasurer" (offices held by petitioner in two separate unions) and 29 U.S.C. §439(d) provides that "[e]ach individual required to sign reports under Section 431 and 433 of this title * * * [is] personally responsible for the filing of such reports and for any statement contained therein which he knows to be false."

2. Whether the Courts below properly rejected petitioner's defense of good faith reliance upon prior reports of inspections by Labor Department Compliance Officers and refused to enter a judgment of acquittal on the records-keeping counts of the indictment herein.

3. Whether the Trial Court properly refused to instruct the jury:

> With respect to the counts of the indictment alleging violations of Title 29, Sec. 436, which we might refer to as the maintenance of records counts, where it is shown that the records of a union were examined by a duly authorized agent of the federal government, that said agent concluded that the record keeping of said union was sufficient and the defendant learned of that conclusion, such testimony should be considered by the jury in deciding the question of the defendant's intent to evade the record keeping requirements of the law.

4. Whether the Trial Court properly refused to instruct the jury:

Title 29, United States Code, Section 431(b) reads as follows:

* * * [The statute is reproduced in the section of this petition entitled "Statutes Involved," *post.*]

The provisions of this statute actually place a duty on the labor organization itself, as opposed to specific individuals, to file the reports referred to therein.

Title 29, United States Code, Section 436 reads as follows:

* * * [The statute is reproduced in the section of this petition entitled "Statutes Involved," *post.*]

Under this Section the required reports, filed by the various labor organizations, must account for, among other things, receipts and disbursements by the labor organization filing the reports and such labor organizations must maintain such records as are necessary to verify, explain or clarify such reports and shall include, among other things, receipts and vouchers.

In view of the above, if Local 1833 or Local 1418 made a disbursement for travel, entertainment or any other purpose, the receipt required would be for the labor organizations' funds so disbursed and would be for the purpose of verifying the fact that the labor organization, that is, Local 1418 or Local 1833, paid such funds to an entity or individual for the purpose noted. For this purpose, the cancelled check of the labor organization, that is Local 1418 or Local 1833, showing that the funds were so disbursed would be sufficient receipt.

STATUTES INVOLVED

Pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 519, Pub. L. 86-257, §§ 201(b), 206 and 209(a, d) (September 19, 1959), are as follows:

Section 201(b), LMRDA, codified at 29 U.S.C. §431(b):

(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail, as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year —

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe.

Section 206, LMRDA, codified at 29 U.S.C. §436:

Every person required to file any report under this subchapter shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary

basic information and data from which the documents filed with the Secretary may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

Section 209(a), LMRDA, codified at 29 U.S.C. §439(a):

(a) Any person who willfully violates this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 209(d), LMRDA, codified at 29 U.S.C. §439(d):

Each individual required to sign reports under Section 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

No provision of the Code of Federal Regulations has been considered pertinent by either of the parties or the Courts below in the course of this litigation, as indeed, criminal liability for violations of the Act cannot be made to turn on regulations made without the consent or approval of Congress. The only thing Congress

authorized the Secretary to prescribe in the relevant sections of the Act was the categories in which information would be reported under 29 U.S.C. §431(b).

STATEMENT OF THE CASE

This application for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit seeks review of a judgment affirming the conviction of petitioner for eight alleged violations of 29 U.S.C. §436 relative to the failure to keep records with which to support the entries made on eight Labor Organization Annual Reports (LM-2's) signed by the petitioner in his capacity as an officer of two separate labor unions who was required under 29 U.S.C. §431(b) to sign the said reports. The Court sentenced petitioner to pay fines totalling $30,000, as follows: $5,000 on each of the convictions in Counts 63 through 66; $2,500 on each of the convictions in Counts 67 through 70. Additionally, the Court placed petitioner on inactive probation for a period of two years.

A seventy-count indictment was returned against petitioner on February 7, 1974, charging that he embezzled the monies of the unions of which he is now an officer (Counts 1 through 62) and that he failed to keep certain documents which would support entries made in the Labor Organization Annual Reports for 1969-1972 (Counts 63-70) filed by Local 1418 and Local 1833, General Longshore Workers, International Longshoremen's Association, AFL-CIO.

On February 27, 1974, petitioner was arraigned and entered pleas of not guilty on each of the said counts.

Trial was had between January 20, 1975 and February 7, 1975, after which the jury acquitted petitioner of the charges made in Counts 1 through 30 relative to the embezzlement of the funds of Local 1418, 60 through 62 relative to embezzlement of the funds of the International Longshoremen's Association, AFL-CIO, and Counts 38 and 40 relative to embezzlement of the funds of Local 1833. The jury could not reach a unanimous verdict on the charges made in Counts 31 through 37, 39 and 41 through 59 relative to the embezzlement of the funds of Local 1833. A mistrial was ordered in the case with respect to those charges on which the jury could not reach a verdict. The only convictions obtained by the Government in this trial to a jury were those relative to the failure to keep records with which to verify the entries made on the Labor Organization Annual Reports to the Secretary of Labor.

In the course of the trial, after the Government rested, the petitioner moved the Court to enter a judgment of acquittal with respect to all counts. That motion was denied.

The Court denied petitioner's requested jury instructions set forth in paragraphs 3 and 4 of the section of this petition entitled Questions Presented, *ante*, pp. 3-5. An objection to the Court's ruling was noted. No similar instruction appears in the charge given by the Court.

Following the conclusion of the trial, defense counsel submitted a motion in arrest of judgment and a motion for a judgment of acquittal after discharge of

the jury, or alternatively, for a new trial. The Court denied these motions in an unreported opinion which has been reproduced herein as Appendix A.

Appeal was taken from the judgment and proceedings had with respect to Counts 63 through 70 on March 26, 1975. The same issues as those presented by this petition were presented to and ruled upon by the Court of Appeals on April 15, 1976. *See* Appendix B, *post*. The gist of the opinion of the Court of Appeals is that petitioner, as a person held personally responsible for filing LM-2's by virtue of 29 U.S.C. §439(d), is a person within the meaning of 29 U.S.C. §436, although §436 is not mentioned, as §§431 and 433 are, in §439(d). The Court below also held that there was not a sufficient foundation in the evidence for the charges setting forth petitioner's theory of defense, *i.e.*, the good faith reliance upon the Compliance Officers' previous reports and investigations, suggesting that the evidence refuted that defense.

Petitioner moved the Panel, and alternatively, the Court *en banc*, for a rehearing of the appeal, pointing out that §439(d) did not cross-refer to §436, as it did §§431 and 433, which either demonstrated an intent on the part of Congress not to hold union officers personally responsible for the records-keeping requirements so far as criminal liability is concerned, or that, by referring only to §§431 and 433, the Congress ambiguously described the conduct for which criminal punishment could be inflicted. Petitioner also pointed out to the Court in the Petition for Rehearing and Petition for Rehearing *en banc* that, since the requested instructions were theory of defense instructions for which there was some evidentiary support,

and that the issue was not the Compliance Officers' testimony several years later of what their scope of investigation and intent was, but what petitioner believed their investigations to have been. The Panel which had considered the appeal of this cause refused rehearing on this petition. The Court *en banc* had copies of the Petition distributed to them and, after a period of inactivity on the part of any of the active judges of the said Court, the Clerk entered an order denying petitioner's Petition for Rehearing *en banc*. The procedure utilized on Petitions for Rehearing *en banc* in the Fifth Circuit does not demonstrate whether any active judge of the said Circuit ever even read the Petition for Rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

1. The court below has decided important questions of federal law which have not been, but should be, settled by this Court.

Petitioner's motion in arrest of judgment and its requested jury instruction #25, as well as the motion for a judgment of acquittal both during and after the verdict, raised the issue whether petitioner was a person within the meaning of 29 U.S.C. §436 and suggested that the indictment, charging him to be such, did not state an offense against the United States over which the Trial Court could assert jurisdiction. The Trial Court filed a written opinion on February 28, 1975, stating its reasons for denying petitioner's motion in arrest of judgment. No other reasons were stated in the record which would serve as further justification for the Court's ruling with respect to petitioner's motion for a judgment of acquittal of the charges made in

Counts 63 through 70 of the indictment. No reasons at all were advanced for the Court's refusal to give petitioner's requested jury instruction No. 25. Petitioner submits that the Court's rationale for the latter actions was crystallized in its written opinion denying petitioner's post-trial motions and that the reason for denying requested Special Charge No. 25 and all related motions was the same.

The indictment did not state an offense against the laws of the United States for the following reasons.

As the Trial Court noted, this is a case of first impression. Appendix A, pp. 2a.

The indictment charged Mr. Chittenden, one of the officers of Locals 1418 and 1833 who signed the LM-2's made the subject of the instant prosecution, with willful failure to keep certain required records. 29 U.S.C. §436, the statute under which it is said this prosecution is justified, provides that "[e]very *person required to file* any report under this subchapter shall maintain records on the matters required to be reported * * *." The only two reports required to be filed under the relevant subchapter are those described in 29 U.S.C. §§431(b) and 433. Section 433 requires certain reporting by employers of members of a union. Petitioner is an officer of a union, not an employer, so could not have been liable for any reports whatever under §433. Therefore, the provisions of §431(b) are the source for the determination with respect to persons required to file reports with the Secretary of Labor. That statute clearly provides, in relevant part, that "[e]very *labor organization shall file* annually with

the Secretary a financial report signed by its president and treasurer or corresponding principal officers * * *." (Emphasis added.) 29 U.S.C. §431(c) is of some support in demonstrating the distinction Congress made between the labor organization, as an entity, and its various officers. That statute provides:

> Every labor organization required to submit a report under this subchapter shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report.

It is the duty of the union to submit the report; it is the collective duty of all of the officers of the union, not just the president and secretary, to keep the records open to the membership.

A labor organization is clearly a "person" liable under 29 U.S.C. §§436 and 439 for the failure to maintain the required records. *See* 29 U.S.C. §402(d). Under the express terms of 29 U.S.C. §431(b), it is *the* person required to file LM-2's. The union president and treasurer are only required to *sign* such reports. 29 U.S.C. §431(b).

The Trial Court clearly understood petitioner's contention. In its written opinion, the Court summarized petitioner's position as follows (Appendix A, p. 2a):

> the defendant argues that since only labor unions are required to file reports, only the labor union itself is a "person" required to maintain records. Although an individual officer must sign the reports, he is not required to file them, and thus may not be criminally culpable under 29 U.S.C. §436. This contention has a certain superficial appeal and indeed has some basis in the literal wording of the statutes cited by the defendant.

The Court found against petitioner, however, on the following basis (*id.*, p. 3a)

> Conspicuously missing from Mr. Chittenden's argument, however, is any reference to 29 U.S.C. §439(d): "[e]ach individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false." This provision effectively dilutes the force of the defendant's contention that the signing and filing of the required reports are entirely unrelated acts with respect to criminal liability. Under §439(d), Chittenden, as an officer personally responsible for the filing of the reports, may be held liable for a violation of §436. * * *

If Congress intended that criminal liability should attach to the president or treasurer of a union for failure to keep required records with which to support the entries made upon LM-2's, then it certainly took a circuitous route. Section 439(d) referred to Sections 431 and 433, but not to Section 436. Had Congress intended that criminal liability should attach to these specific individuals for failing to maintain records, then §436 was the perfect place to say so. All §439(d) did was to make the said officials responsible for the filing of the reports and for the truthfulness of the information contained in them. It was still the labor organization which was required to file the reports. Had the reports not been filed, §439 provided that the designated principal officers of the union would be subject to prosecution. But declaring that such officials are responsible for the filing of such reports is not the same as declaring that they are the persons required to file such reports within the meaning of §436.

In *Winters v. New York*, 333 U.S. 507, 515-516 (1948), this Court said:

> * * * The standards of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness." * * * There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act * * * or in regard to the applicable tests to ascertain guilt. (Citations and footnotes omitted.)

The problem with the construction put upon the statutes by the Courts below are threefold: (1) it constructed a crime from a mixture of civil and criminal provisions by a patent form of circular logic; (2) the criminal provisions, as construed by the Courts below, lacked ascertainable standards of guilt for an omission to keep required records in the presence of a statute which specifically dealt wih the subject matter on a more restrictive scale, §439(c); and, (3) by the construction put upon the statutes under the Labor-Management Reporting and Disclosure Act of 1959 by the Courts below, there is grave uncertainty in regard to persons within the scope of the act as well as in regard to the applicable tests of guilt.

Offenses dealing with records-keeping violations are specifically set forth in §439(c). For such liability to exist, the individual must be proved beyond a reasonable doubt to have willfully concealed, withheld or destroyed the required records. The Government here alleged it to be an offense for which a union officer is culpable merely to omit to keep such records as an ancillary responsibility to the signing of the LM-2's. In the statute in which "personal responsibility" is cast upon individuals, however, such responsibility is limited merely to the filing of the reports and to the verbal content thereof. The statute does not place personal criminal liability upon union officials for anything more. For the Courts below to have considered that it does was error here and petitioner is entitled to a reversal of his conviction for acts for which he was not held personally responsible under the Act. The Court below failed to reverse the judgment of the district court. This Court should not

allow to stand a conviction which is not founded in the law.

Since there was no criminal culpability of petitioner, the Trial Court should have entered a judgment of acquittal at the close of the Government's case. It should have granted petitioner's motion in arrest of judgment and the motion for a judgment of acquittal after discharge of the jury.

Other grounds existed for granting a judgment of acquittal. 29 U.S.C. §439(a) requires proof that the conduct alleged was willfully done.

Mr. Robert D. Victoria, a Compliance Officer for the Labor-Management Services Administration of the Department of Labor, examined the financial records of Local 1833 in 1970. (Tr. 1215, 1216) Mr. Victoria was provided access to all of that union's financial records he cared to see. (T. 1216-1217) After making a thorough review of all the financial records of Local 1833, Mr. Victoria issued a report saying that his investigation revealed "no irregularities." (Tr. 1224; Defendant's Exhibit D-1) Among the union's records then being maintained, there were no receipts kept showing how the individuals who had been reimbursed by union checks had spent the money. (Tr. 1224) No mention was made in his report of the absence of receipts with which to verify these reimbursed expenses. (Tr. 1225) Mr. Victoria informed Messrs. Durnin and Chittenden of some irregularities, none of which were similar to the irregularities alleged in the indictment herein. (Tr. 1225) Mr. Victoria's examination was made of the union's records for 1968. (Tr. 1229) In spite of the fact the Compliance Officer found no receipts by which he

could determine the actual expenditure of amounts reimbursed, he did not inform the union officials the records were deficient to comply with the Labor-Management Reporting and Disclosure Act of 1959. (Tr. 1232-1233) The precise words of Mr. Victoria's report were:

> An examination of the local union's financial records were conducted, and no irregularities were disclosed. (Tr. 1235; Defendant's Exhibit D-1, p. 1, ¶ 2.)

Mr. Victoria conceded that the receipts, if they existed, would be a part of the financial records of the union. (Tr. 1235)

As a Compliance Officer, Mr. Victoria was a person charged with the administration of the Labor-Management Reporting and Disclosure Act of 1959. In the absence of judicial construction of an Act's provisions, the Courts rely heavily on the interpretation put upon the laws by the agencies of the United States Government which are charged with the enforcement and administration of the Act's provisions. There seems to be no legitimate reason why Mr. Chittenden's reliance upon the Agent's determination that no irregularities were found with respect to the adequacy of the financial records-keeping connected with the 1968 LM-2's, which were kept the same way as the 1969 through 1972 records, was not at least as legitimate as such reliance placed by the Courts upon such administrative interpretation by Government agents.

With respect to the administration of that aspect of the law, Mr. Victoria stood in a position equally as competent as an attorney to determine what conforms to the requirements of the Act. It is well-established that evidence of good-faith reliance upon the advice of an attorney, after full disclosure of the relevant facts, would negate the essential element of criminal intent. *United States v. Musgrave*, 444 F.2d 755 (5 Cir. 1971). In *United States v. Oates*, 467 F.2d 129 (3 Cir. 1972), *cert. den.*, 410 U.S. 909 (1973), the defense of good faith reliance upon an accountant's advice concerning the Labor-Management Reporting and Disclosure Act of 1959 was rejected only because the defendant there failed to show full disclosure of all relevant facts to the accountant. An accountant's advice was likewise regarded to be a sufficient defense in *United States v. Platt*, 435 F.2d 789 (2 Cir. 1970), *cert. den.*, 402 U.S. 913 (1971). Coupling the fact that Mr. Victoria was both an accountant who had full access to the union's financial records to the extent he requested to examine them (Tr. 1216-1217) with the fact he was a Government official charged with knowing what records-keeping does or does not conform to the law and he found no irregularity in the manner the records-keeping here was found to have been deficient, it seems impossible that a reasonable minded jury could have found beyond a reasonable doubt that Mr. Chittenden willfully failed to keep required records, had they only been charged on the defense of good-faith reliance in the circumstances presented.

Petitioner's requested instruction No. 22, quoted in the third Question Presented, *ante*, p. 3, was rejected by the Trial Court, and that rejection was affirmed by the Court below. Until this case, the law had been that a

defendant is entitled to a theory of defense instruction for which there is any support in the evidence, no matter how weak or incredible the evidence might be. *Perez v. United States*, 297 F.2d 12, 15-16 (5 Cir. 1961); *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951); *Hyde v. United States*, 15 F.2d 816 (4 Cir. 1926); *United States v. Platt*, 435 F.2d 789, 792 (5 Cir. 1970). In the *Perez* case, *supra*, the Fifth Circuit wrote:

> It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. * * * A charge is erroneous which ignores a claimed defense with such a foundation. * * * The charge to which he is entitled, upon proper request, in such circumstances is one which precisely and specifically, rather than merely generally or abstractly, points to his theory of defense * * *, and one which does not unduly emphasize the theory of the prosecution, thereby de-emphasizing proportionally the defendant's theory. * * *

In *United States v. Platt, supra*, the Court, relative to the question when a jury instruction on good faith reliance was required to be given, said, after distinguishing a case arising in the Tax Court in which the Court of Appeals' review was limited:

> We have here the different question whether the record contained an evidentiary basis sufficient to entitle the defendant to an instruction on the defense of reliance. The threshold required for this is not very high:

> A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be.
>
> *United States v. O'Connor*, 237 F.2d 466, 474 n. 8 (2 Cir. 1959).* * *

In the *Platt* case, the issue was the faith of the defendant in relying upon the belief his accountant had obtained an extension for the filing of certain tax returns. The Court said (*id.*, at 792):

> * * * If there were no facts in the record supporting Platt's claim of reliance, the judge would have been justified in refusing to charge more specifically on that point. But here the jury could have found that Raeman's conversations with Platt concerning extensions amounted to an assurance that such extensions would continue to be forthcoming and that all of Platt's failures, whether to file the returns or to provide Raeman with the information necessary for their preparation, were founded on an honest, although mistaken, belief that Raeman had secured such extensions.

The same reasoning was applicable here. It was not the fact of the nature of the prior examination by Labor Department Compliance Officers, but Chittenden's belief concerning the nature of those examinations, that afforded or denied him an acquittal on the ground of reliance. That was a jury determination which

should have been made upon proper instructions to the jury, including an instruction on good faith reliance.

Rather than to have left this to a jury upon proper instructions, however, the Court of Appeals undertook to analyze certain evidence adduced and to determine that the defense was refuted by the testimony of another Compliance Officer, Officer Ryan, which was given several years before Officer Victoria's examination and report — which immediately preceded the records-keeping and reports for the years in question here. It was not a proper appellate determination whether the defense was refuted. The proper appellate function is to determine whether there is any evidential basis for the instruction and, if so, to reverse a conviction in which a valid defense has been withheld by the refusal to give the proper instructions to the jury.

The Court of Appeals thus acted in a manner which not only sanctioned a gross departure from the usual course of judicial proceedings, destructive of the rights of petitioner to even present a defense, but it compounded that which it sanctioned by not only recognizing that a factual basis was presented but by undertaking the function left entirely to juries under our Constitution to determine whether the defense was refuted.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

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CERTIFICATE

I certify that the requisite number of copies of the foregoing Petition for a Writ of Certiorari have been served on the Solicitor General of the United States by mailing a copy of same to him at his office in Washington, D.C., this ___ day of June, 1976.

F. IRVIN DYMOND
Attorney at Law

APPENDICES

APPENDIX A

Minute Entry
February 28, 1975
Heebe, J.

UNITED STATES OF AMERICA	Criminal Action
versus	No. 74-84
ALFRED F. CHITTENDEN	Section B

This cause came on for hearing on a previous day on the motions of the defendant for arrest of judgment, for judgment of acquittal after discharge of the jury, or alternatively, for a new trial.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the motions of defendant for arrest of judgment, for judgment of acquittal after discharge of the jury, or alternatively, for a new trial, be, and the same are hereby, DENIED.

REASONS

The defendant Alfred Chittenden, an officer of two local unions of the International Longshoremen's Association, AFL-CIO, has been convicted after a trial by jury of eight counts of failure to maintain proper labor union records, in violation of 29 U.S.C. §§ 436, 439(a). He is presently before the Court on two

motions, one a motion for arrest of judgment and the other for judgment of acquittal after discharge of the jury, or alternatively, for a new trial. The latter motion raises grounds challenging the sufficiency of the evidence and the failure to charge the jury on certain requested instructions relating to the interpretation of the evidence. These are proper matters for decision by the jury and require no further comment by this Court.

The motion for arrest of judgment, however, presents a novel question of statutory construction. The defendant's argument rests upon a tripod of interrelated statutes. The first leg of this tripod is 18 U.S.C. § 436: "[e]very *person* required to *file* any report under this subchapter shall maintain records on the matters required to be reported. . . ." (emphasis added) The responsibility of filing reports is set forth in 29 U.S.C. § 431(b): "[e]*very labor organization shall file* annually with the Secretary a financial report *signed* by its president and treasurer . . . containing the following information . . . ." (emphasis added) Finally, the defendant notes that the term "person" as used in these sections is defined as "including one or more individuals, labor organizations, partnerships," etc. 29 U.S.C. § 402(d).

From this, the defendant argues that since only labor unions are required to file reports, only the labor organization itself is a "person" required to maintain records. Although an individual officer must sign the reports, he is not required to file them, and thus may not be criminally culpable under 29 U.S.C. § 436. This contention has a certain superficial appeal and indeed has some basis in the literal wording of the statutes cited by the defendant.

Conspicuously missing from Chittenden's argument, however, is any reference to 29 U.S.C. § 439(d): "[e]ach individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false." This provision effectively dilutes the force of the defendant's contention that the signing and filing of the required reports are entirely unrelated acts with respect to criminal liability. Under § 439(d), Chittenden, as an officer personally responsible for the filing of the reports, may be held liable for a violation of § 436. Although our research has disclosed no cases in which the precise contention made by the defendant has been discussed, individuals have been convicted under 29 U.S.C. § 436 and these convictions affirmed by the Court of Appeal. *E.g.*, United States v. Ottley, No. 74-1731 (2d Cir. Jan. 7, 1975). None of these courts apparently found any statutory bar to convicting individuals under § 436.

In Shultz v. Local Union 1694, I.L.A., 310 F.Supp. 1356, 1361 (D.Del. 1970), the court found a violation by the "Union *and its responsible officers*" of "the duty imposed by Section 436 of the Act to keep financial records which permit verification of the accuracy of the financial reports submitted pursuant to Sections 431(b) and 437(b)." (emphasis added) This construction of § 436 is entirely consistent with the intent of Congress to insure disclosure of the financial operations of the unions to their members, United States v. Budzanoski, 462 F.2d 443 (3rd Cir. 1972), and to do this by imposing criminal liability upon those persons most responsible for providing that disclosure.

Since we find no impediment created by statute to the convictions of individuals for violations of 29 U.S.C. § 436, the motion for arrest of judgment must be denied.

/s/ FREDERICK J.R. HEEBE

Roy Beene
Albert Winters, Jr.
Irvin Dymond
William Crull, III

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alfred F. CHITTENDEN,
Defendant-Appellant.

No. 75-1874.

United States Court of Appeals,
Fifth Circuit.

April 15, 1976.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before DYER and CLARK, Circuit Judges, and KRAFT*, District Judge.

DYER, Circuit Judge:

Chittenden, a union official, appeals his jury conviction of criminal violations of Section 206 of the Labor-

* Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C.A. §§ 436, 439(a), contending that he was not subject to the record-keeping requirements, and further that the district court improperly instructed the jury. We affirm.

Chittenden has been President of Local Union 1418 in New Orleans, and Secretary-Treasurer of Local Union 1833 in Baton Rouge, of the International Longshoremen's Association for a number of years. In a 70 count indictment he was charged with 62 counts of embezzlement of union funds and 8 counts of failure to maintain adequate records. He was acquitted on a number of embezzlement counts and a mistrial was ordered on the remainder of the embezzlement counts. He was convicted on the 8 counts for record-keeping violations.

Upon appeal Chittenden raises as he did in the district court a threshold objection that he is not a "person" within the meaning of the statutory provision. Section 436 provides that:

> Every person required to file any report under this subchapter shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Secretary may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period

> of not less than five years after the filing of the documents based on the information which they contain.

29 U.S.C.A. § 439(a) provides that any person who wilfully violates this provision shall be imprisoned for not more than one year, or shall be fined not more than $10,000, or both.

Chittenden argues he cannot be treated as a Section 436 "person required to file any report" because Section 431 of the LMRDA requires only labor organizations to file these financial reports:

> Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer . . .

Because Section 431 does not require individuals to file these reports, Chittenden concludes that Congress criminally imposed the record-keeping requirement only on the labor organizations, not the individuals.

We disagree. This contention has been rejected by the Second Circuit, *United States v. Ottley*, 2 Cir. 1975, 509 F.2d 667, 672, n. 8. The district court here, in following *Ottley*, correctly analysed the flaw in this interpretation of the statutory record-keeping requirement:

> Conspicuously missing from Chittenden's argument, however is any reference to 29 U.S.C. § 439(d): '[e]ach individual required to sign reports under sections 431 and 433 of this

> title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.'

Section 431(b) requires that the report *filed* by the labor organization be *signed* by the president and treasurer of that organization. Because these officials are required to sign the reports, it is clear that the president and treasurer of a union are "personally responsible for the filing of such reports" within the language of Section 439(d). Hence, it is obvious that as persons responsible for the filing of the reports, both the president and treasurer fall squarely within the ambit of Section 436. We agree with the district court that Chittenden, as both president and treasurer, was a person subject to the record keeping requirement of Section 436.

Finally Chittenden argues that even if he can "legitimately be charged with omitting to maintain the said required records," nevertheless the government failed to prove (1) that the records maintained by the unions were in fact inadequate for the purposes stated in Section 436; (2) that, even if the records maintained were inadequate, the failure to maintain the records was "willfully" done. He argues that the cancelled checks merely showing total disbursements constituted adequate records of how the unions' monies were expended.

It is true that Section 436 requires no particular bookkeeping system; nevertheless, that provision specifically requires "in sufficient detail" (29 U.S.C.A. § 436) the maintenance of whatever records are

necessary to establish accurate "disclosure of financial operations of the unions to their members." *United States v. Budzanozki*, 3 Cir. 1972, 462 F.2d 443, 450, *cert. denied* 1972, 409 U.S. 949, 93 S.Ct. 271, 34 L.Ed.2d 220. Chittenden's retention of cancelled checks without specific expense receipts and itemization is a form of "record keeping" woefully insufficient to achieve

> the purpose of the LMRDA [which] is not just to prevent embezzlement and fraud; as we have noted, it is to provide information for the members so that they can control their leaders.

Budzanoski, supra, at 452. The Second Circuit in *Ottley, supra*, observed, "The voucher slips he submitted were minimal. They contained only the date, the amount received from the union, his signature and the notation 'for reimbursed expenses.' " *Id.* at 674, n. 11. The court refused to consider such records sufficient as a matter of law and submitted the issue to the jury. Similarly here the district court correctly declined to give the jury instructions urged by the defendant, that the cancelled checks were adequate as a matter of law.

Chittenden assigns as error the district court's refusal to instruct the jury that good faith reliance on prior inspections by Compliance Officers of the Department of Labor would preclude a finding of the requisite "willful" intent to fail to keep records. But, the evidence fails to provide a foundation for such a charge. On the contrary, the inspection performed in

1970 was for specific shortcomings only, and was not a complete financial examination. Compliance Officer Victoria testified at length that there was no doubt that his examination in no way entailed an approval of the Union's system of bookkeeping; he said he "wasn't looking for anything beyond the allegations made and the complaint." He looked at records only for one year, 1968. He did not have full access to union records. Moreover, he testified that he did tell Chittenden that he had found certain deficiencies even within this narrow scope of his inspection. Such an inspection could not be relied upon in good faith as government approval of the union's overall pattern of maintenance of records.

Indeed, other evidence refutes any contention of good faith reliance by Chittenden. Compliance Officer Ryan testified that after his examination of these unions' records in 1962 he warned Chittenden of their inadequacy under the legal requirements contained in Section 436. Officer Ryan pointed out to Chittenden where the records were inadequate to verify disbursements. He read the law to Chittenden and explained what records were necessary. He informed him how the union books should be adjusted in order to comply with Section 436.

We find no evidentiary support for Chittenden's argument that "willful" violation was not proven because of good faith reliance. The court's refusal to give Chittenden's submitted charge was not error.

AFFIRMED.

APPENDIX C

United States Court of Appeals
For the Fifth Circuit

October Term, 1975

No. 75-1874

D. C. Docket No. CR-74-84-B

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

ALFRED F. CHITTENDEN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before DYER and CLARK, Circuit Judges, and KRAFT*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

* Senior District Judge of the Eastern District of Pennsylvania, sitting by designation.

of the said District Court in this cause be, and the same is hereby, affirmed.

April 15, 1976

Issued as Mandate: June 3, 1976

APPENDIX D

United States Court of Appeals
Fifth Circuit

Office of the Clerk

May 26, 1976

TO ALL COUNSEL OF RECORD

No. 75-1874-USA v. Alfred F. Chittenden

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ SUSAN M. GRAVOIS
Deputy Clerk

/smg

cc: Messrs. F. Irwin Dymond
William L. Crull, III
Ms. Mary Williams Cazalas
Mr. Roy Beene

Supreme Court, U. S.
FILED
SEP 9 1976
MICHAEL RODAK, JR., CLERK

No. 75-1869

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALFRED F. CHITTENDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
RICHARD S. STOLKER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1869

ALFRED F. CHITTENDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 530 F. 2d 41. The opinion of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on April 15, 1976. A petition for rehearing (Pet. App. D) was denied on May 26, 1976. The petition for a writ of certiorari was filed on June 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was a person required to file annual labor organization reports under 29 U.S.C. 436.

2. Whether the district court properly denied petitioner's timely motion for judgment of acquittal.

3. Whether the trial court properly refused to give certain requested special instructions to the jury.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on eight counts of willful failure to maintain proper records supporting annual labor organization reports (Forms LM-2) required by 29 U.S.C. 431(b) to be filed with the Secretary of Labor, in violation of provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 436 and 439(a). He was sentenced to pay fines of $5,000 each on four of the counts and of $2,500 each on the other four counts, for a total of $30,000, and was placed on probation for two years.[1]

The evidence is not in dispute. It established that petitioner, who served as president of Local Union 1418 and as secretary-treasurer of Local Union 1833, General Longshore Workers, International Longshoremen's Association,[2] had received expense payments from the labor organizations but had failed to file receipts for expenditures, vouchers, or minutes of executive board authorizations of such expenditures, as required by 29 U.S.C. 436.

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[1]The jury acquitted petitioner on 35 counts of embezzlement, and a mistrial was declared as to 27 remaining counts of embezzlement as to which the jury was unable to reach a unanimous verdict.

[2]In addition, petitioner was the vice president of the International Longshoremen's Association and a senior member of the Executive Board of the South Atlantic Gulf Coast District of the International Longshoremen's Association (Tr. 1397).

ARGUMENT

1. 29 U.S.C. 431(b) provides that "[e]very labor organization shall file annually with the Secretary [of Labor] a financial report signed by its president and treasurer" containing certain information. Section 436 provides that "[e]very person required to file any report * * * shall maintain records on the matters required to be reported * * *," and Section 439(a) provides that "[a]ny person who willfully violates this subchapter" shall be punished as provided. Petitioner argues that only a labor organization is required to file reports under Section 431(b), and that therefore only a labor organization—not an individual like himself—can be a "person" required to maintain records under Section 436. The capstone of the argument is that only a labor organization can be a "person" under Section 439(a) for purposes of violating the Act.

As the courts below noted, petitioner's position ignores 29 U.S.C. 439(d). Section 439(d) provides that "[e]ach individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false." Thus a union president or treasurer would be personally responsible under Section 439(d) for the union's failure to file the financial report required by Section 431(b), and as such would be a "person required" to file the report for the purpose of the recordkeeping requirement of Section 436. Petitioner's contrary construction imputes to Congress the intent to fix responsibility upon identified individuals for the failure to file the required reports, but to leave a gap in the responsibility for maintaining the records necessary to insure that such annual filings are not fraudulently or erroneously made. Congress plainly did not intend to create such an anomalous

situation; indeed, the legislative history of the statute indicates that Congress intended to affix both individual and organizational accountability for failure to maintain records and file reports. See S. Rep. No. 187, 86th Cong., 1st Sess. 10 (1959).

By virtue of his union offices, petitioner was required by 29 U.S.C. 431(b) to sign the unions' annual financial reports and was therefore personally accountable under Section 439(d) for their filing. *United States* v. *Ottley*, 509 F. 2d 667, 672 (C.A. 2); see also *United States* v. *Budzanoski*, 462 F. 2d 443, 452 (C.A. 3). Thus, he was punishable criminally for the willful failure to maintain the underlying records required by the statute to be kept. *United States* v. *Budzanoski, supra*, 462 F. 2d at 450-452; *United States* v. *Ottley, supra*.[3]

2. There is accordingly no merit in petitioner's companion contention that the trial court erred in refusing to instruct the jury that Section 431(b) "place[s] a duty on the labor organization itself, as opposed to specific individuals, to file the reports referred to therein," and that it was the labor organizations' duty to maintain the underlying records (Pet. 4). By suggesting that the duties to file and maintain records lay solely with the labor organization, petitioner's requested special charge ignores the plain language of Section 439(d) and misstates the law. A trial court has no duty to give an erroneous instruction. Cf. *United States* v. *Erlenbaugh*, 452 F. 2d 967, 973 (C.A. 7), affirmed, 409 U.S. 239.

[3]Since only willful failures to maintain such records are punishable under 29 U.S.C. 436, there is no danger (as petitioner supposes, Pet. 16-17) that innocent recordkeeping omissions will result in criminal sanctions.

3. Petitioner contends that the district court erred in refusing to grant his motion for judgment of acquittal on the theory that he allegedly relied in good faith upon a 1970 examination of certain union records by Labor Department Compliance Officer Victoria that revealed no irregularities. While good faith reliance upon an expert's advice, based on full disclosure by the defendant and a complete examination of the records, may be asserted to negative criminal intent (*Bursten* v. *United States*, 395 F. 2d 976 (C.A. 5); cf. *United States* v. *Cox*, 348 F. 2d 294, 296 (C.A. 6)), the prerequisites for the defense were conspicuously absent in this case.

Compliance Officer Victoria testified that he conducted only a superficial examination of the records of Local 1833 for specific shortcomings in that union's affairs, rather than a complete financial examination (Tr. 1230, 1233-1234). He received and reviewed only selected records from Local 1833. He was not furnished check stubs or minutes of executive board meetings (Tr. 1216, 1218-1221).[4] Victoria's failure to discover recordkeeping deficiencies in the course of his cursory examination of Local 1833's affairs falls far short of the advice of lawfulness, given after full disclosure of all relevant facts, that may justify a good faith reliance defense to a criminal prosecution. See *United States* v. *Oates*, 467 F. 2d 129 (C.A. 3), certiorari denied *sub nom. Miller* v. *United States*, 410 U.S. 909; *United States* v. *Cox, supra*; *United States* v. *Bath*, 504 F. 2d 456 (C.A. 10). Moreover, in the course of a more intensive

[4]Petitioner's failure to keep minutes of executive board meetings (Tr. 65) was among the recordkeeping violations for which petitioner was convicted.

examination in 1962, Compliance Officer Ryan had informed petitioner of the requirements of Section 436 and had specifically apprised him that minutes, expense authorizations, and expense receipts must be maintained in order to comply with the statute (Tr. 449-460). Accordingly, the trial court correctly denied petitioner's motion for judgment of acquittal.[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
RICHARD S. STOLKER,
Attorneys.

SEPTEMBER 1976.

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[5]Nor was it error for the district court to refuse to give petitioner's requested instruction (Pet. 3, para. 3) concerning the jury's ability to consider Victoria's examination in determining the willfulness of petitioner's failure to maintain the necessary records. Petitioner does not contend that the district court's instructions regarding willfulness were deficient in any way, or that the court prevented him or restricted him in any way from arguing directly to the jury that it should infer a lack of willfulness on his part in light of Victoria's examination. Petitioner cites no authority, and we know of none, for the proposition that the district court must instruct the jury as to every possible inference that might permissibly be drawn from every item of evidence introduced at trial.